



Uncle Sam is watching you

The US often extends its jurisdictional reach far beyond its borders. Yesterday, experts, officials and counsel gathered to discuss the issues surrounding that trend at the 'SPPI showcase: The USA's long arm of justice and what it means to the world'.

For US counsel, the country's prosecutors pursuing non-US citizens worldwide might seem like business as usual. The real issue is how other countries behave.

"The fight is the extradition. The US can oftentimes establish jurisdiction to the satisfaction of courts," said Charles Duross, partner at Morrison & Foerster. He suggests that other countries' courts and jurisdictions also make decisions about the validity of US requests with reference to their own laws.

So why does the US have such wide and long reach? "We have international commitments to try and enforce US law," said Mary Butler of the Department of Justice's (DoJ) International Unit of the Asset Forfeiture and Money Laundering Section.

"The concern is obviously neither that the US be a safe haven for the proceeds of crime, nor that our financial system be used to facilitate or promote crimes around the world," she said, noting the large size of the US economy and globalisation as the forces at play.

Define extraterritorial

All this leads to the importance of defining extraterritorial. "I don't think the US, when it comes to the Foreign Corrupt Practices Act (FCPA), necessarily views it as extraterritorial," Duross said.

"If you're an FCPA nerd like I am, you'd realise it applies to US citizens, US companies, foreign companies that trade on US exchanges and foreign nationals or privately held foreign companies that act in the US," Duross said. And Duross doesn't limit that view to the FCPA. More widely, he believes most people might be surprised as to the extent of what the US thinks is not, in fact, extraterritorial.

"Narcotics, terrorism, taxation – you name it," Duross said, citing the reach of conspiracy law and noting people have been arrested and convicted without ever having ever stepped foot inside the US. "The US is the 800lb gorilla," he said.

But global distance presents challenges too. "The harder part isn't establishing basis for involving the US jurisdiction, it's finding the proof of specific foreign offences," Butler said.

Pass the ball

A recent and high-profile example of Uncle Sam's increasingly long reach is the recent Fifa scandal. In May 2015, after an investigation by the (FBI), the DoJ indicted 14 current and former Fifa officials on charges of corruption. Many arrests were made outside the US. "I think this case is very interesting," said Thomas Werlen, managing partner at Emanuel Urquhart & Sullivan in Zurich. His firm represents Fifa in the ongoing case and he was not speaking on behalf of the organisation. "Various people were indicted by the US who are not US nationals," Werlen said.

US counsel also have perspectives on the case. "I've never been to a soccer [football] game and I didn't know what Fifa was when I was tapped on the shoulder to join its independent governance committee," said James Klotz, partner at Miller Thomson. Fifa created the organisation – the IGC – after the controversial decision to award Qatar the 2022 World Cup. Qatar, some felt, would be far too hot to play sports.

"It was either grand corruption or Fifa was being visionary," Klotz said of the decision. "But it wasn't really a great surprise to any of us that the US did something," he added, speaking of the later scandal in which 41 people have been charged, including US citizens. At least 12 people have pleaded guilty.

So, if you do wrong in a dollar-based global economy, Uncle Sam can likely come knocking. Often, however, becoming entangled in the US jurisdiction is a matter of choice. "Last August I was in a very wet, Southern Manhattan about to go into the Department of Financial Services (DFS)," said Jonathan Grimes, partner at Kingsley Napley.

According to Grimes, he was with a client, one who was a European citizen and hadn't actually done anything wrong. So why were they standing in the rain, in New York, about to enter the DFS? The answer is simple: the client's bank is very keen to cooperate with Americans. "It just wasn't a good idea to get on the wrong side of the US regulator," Grimes said.

Key takeaways

- The US is continuing to extend its jurisdiction far beyond its borders;
- Major recent corruption scandals have seen either US officials' involvement or leadership;
- But US counsel and the US Department of Justice don't always define their global reach as extraterritorial.



NEWS

Lessons in restructuring from yesterday's session

PAGE 2



BREXIT

Jack Straw on why Britain really left the EU

PAGE 6



LORETTA LYNCH

On why the IBA has a key role in preserving justice

PAGE 8



SPONSORED BY



مركز دبي للتحكيم الدولي
Dubai International Arbitration Centre
An Initiative by Dubai Chamber of Commerce & Industry

HADEF & PARTNERS

Pushing forward

The Rule of Law Symposium is now a regular fixture at IBA's annual conference. Today's all-day event will tackle Iran and troubles in the Middle East

Since 2006, the final day of the IBA Annual Conference has been dedicated to rule of law issues. This traditional conference highlight has been running since 2005 when, in Prague, the IBA Council passed a Rule of Law Resolution.

That was swiftly followed by a rule of law initiative in 2006, with the Rule of Law Forum currently responsible for provoking, urging and assisting the membership of the IBA in supporting and promoting the rule of law.

The session always focuses on contemporary and extremely relevant current events or issues affecting the profession, and is led by the Rule of Law Forum. Following successful rule of law symposia in Chicago, Singapore, Buenos Aires, Madrid, Vancouver, Dubai, Dublin, Boston, Tokyo and Vienna, the final day of the conference in Washington DC 2016 will also be devoted to the rule of law. This year, the Symposium will analyse and discuss 'Special regional challenges to the rule of law' and 'Iran: testing the rule of law'.

This year would certainly seem a fitting year to continue this work. As the world

increasingly appears to be leaving its period of post-Cold War stability behind, one of the key features of the instability that's followed is a weakened rule of law.

Prominent examples range from the complete abandonment of local, regional and international legal norms, with the rise of the terror group so-called Islamic State (IS) in Iraq and Syria, to what seems like the subtle but steady erosion of regional legal frameworks. One example of the latter trend is, of course, to be found in Turkey where in July the Turkish army apparently attempted to overthrow the elected government. And in recent years the Iranian regime has, and some would argue continues, to skirt on the edge of acceptable international legal conduct. In short, many rule of law issues – and many challenges to it – abound in the modern Middle East.

Regional challenges

Fitting, then, that the morning programme of the Rule of Law Symposium will examine the troubled Middle East region's conflict situation. This will be done through the lens of the region's diverse history, as

well as through the subjective views of protagonists, and the previous efforts – often failed – to resolve protracted issues.

Crucially, the session will also examine the applicability of the principles of international law, and the elements and potential compromises within or resolution of conflicts, or the resolution of particular is-

sues conflicts have created. Participants will include lawyers from the region itself, diplomats or negotiators who have sought to deal with the issues, international law authorities and Rule of Law Forum leaders involved in the project. Each participant will bring their individual expertise to bear on what is a complex topic of nothing less than critical global importance.

Iran: testing the rule of law

The afternoon programme looks at a range of rule of law issues related to a country and a regime at the heart of the Middle East's current configuration: Iran. Those issues ranging from compliance with the Nuclear Arms Agreement, to issues of economic sanctions, to international law principles related to regional stability and the actions of IS. Moderator Essam Al Tamimi will discuss with experts on Iran and experts on related issues of international law, rule of law questions in which Iran may be involved. Each is a fascinating topic, and in recent years the global media have kept their focus firmly on Iran – and the Obama administration – as both interacted in their high-stakes geopolitical negotiations. At the heart of these issues to date? The rule of law, which of course will be key to any future developments too.

The keynote speaker is Anthony Kennedy of the US Supreme Court. Other speakers are Aaron David Miller, vice-president for New Initiatives at the Woodrow Wilson International Center for Scholars in Cleveland, and Kito de Boer, head of mission of the Office of the Quartet, Dubai.

"The Iranian regime has...skirted on the edge of acceptable international legal conduct"

SESSION

Rule of Law Symposium – Voices of the next generation: bringing change to the Middle East

COMMITTEE

Presented by the Rule of Law Forum

TIME/VENUE

**Today 10:00 – 16:00
Salon 3, Lobby level**

News

Failing to prepare, preparing to fail

Restructuring troubled divisions must be done in a structured and responsible manner to avoid future problems, according to panellists on yesterday's session 'Restructuring distressed businesses: strategies for saving healthy assets, carve-outs and divestments of losing assets and recognising the difference'.

"Both the sell and buy-sides need to do their homework properly," said session chair Ralf Morshäuser, of Gleiss Lutz in Germany. "You need to take care of all risks and challenges posed by the restructuring of that business."

According to the American Bankruptcy Institute, total bankruptcy filings in 2015 were 10% lower than in 2014, continuing the downward trend seen in recent years. That's in spite of troubled global macroeconomic and financial conditions putting more and more pressure on businesses.

This means companies are exploring other options to take care of distressed assets, subsidiaries or divisions. However, not all are carrying out proper due diligence in assessing and accounting for all the specificities of the troubled business to ensure it survives after being sold off. In some jurisdictions, employees have a right to block a transfer if they object to the deal.

In Germany, the first case that made the M&A and restructuring communities think about these issues was Siemens' sale of its unprofitable mobile phone business to Taiwan's BenQ in 2005. The deal saw some of the unit's 1,400 employees going back to Siemens when the company filed for insolvency a year after the sale closed, claiming the transfer was not handled properly.

According to Ian Johnson from Slaughter and May in London, UK retailer British Home Stores' recent collapse is also an example of how not to handle a restructuring. Owner Sir Phillip Green took dividends out of the business and decided he did



Ralf Morshäuser and Joanna Gumpelson

not want the associated liabilities. He sold the loss-making business, which went into administration earlier this year, 13 months after the sale, for just £1 (\$1.30).

"This goes to show that to some extent, a seller does have a corporate duty to look ahead," said Johnson. "What you need is a responsible sale process, and an assessment of the risks and threats in the business."

Meanwhile Nagashima Ohno & Tsunematsu partner Yutaka Kuroda provided an example of a well-handled sale. He outlined Panasonic's 2008/9 restructuring and the sale of various assets it had previously acquired from Sanyo.

"Panasonic did a good job choosing the buyer for these assets," he explained. "They were a credible purchaser with a viable business plan, which meant the business survived various sales."

Key takeaways

- Both the sell and buy-sides need to do their homework properly in the case of the sale of a distressed business;
- Not all are carrying out proper due diligence in assessing and accounting for all the specificities of the troubled business to ensure it survives after being sold off;
- In some jurisdictions, employees have a right to block a transfer if they object to the deal.

Joanna Gumpelson, of Paris-based De Pardiou Brocas Maffei, outlined a growing trend in French case law where former creditors and employees are attempting to trigger shareholder liability in the event the sale of a distressed business goes wrong.

"France's highest court has recognised the admissibility of such claims," she said. "If the acquiring third party has a bad business plan, which means the business goes bankrupt, employees can sue for wrongful negligence."

The situation is similar in the Canadian energy industry, when it comes to assets that have environmental issues attached to them. According to Neil Narfason of Ernst & Young, companies like Esso can sell such assets, but don't want to be held liable in the event they cause environmental damage.

He said that those companies will tend to sell to the 'most credible bidder', not necessarily the highest bidder, because they do not want to be held responsible several years after the deal.



OMC Abogados & Consultores

Phone: (311) 626 – 1238 / Fax: (311) 626 – 1241

E-mail: omc@omc-abogados.com.pe



YOUR LATIN-AMERICAN LAW FIRM IN PERU ... THE HUB OF THE AMERICAS



"Entering to the Latin American market never was so easy!"

"Local connections make all the difference when legal matters cross borders."

With a large variety of practice areas, we are ideally positioned in the geographic center of the region, working side by side with our partners in PERU and LATAM. We must consider that local connections make all the difference when legal matters cross borders.

www.omcabogados.com.pe



ECB: Banking Union needs work

The European Central Bank has admitted there's still work to be done in the pursuit of the eurozone's Banking Union. In particular, the central bank cites challenges facing the Single Supervisory Mechanism (SSM) in harmonising national and European law and supervisory cultures.

"In the last two years we have notched up a lot of achievements. But there is still much to do. We need to further the work of the harmonisation of liquidity risk," said Bernhard Hörtnagl, head of section at the European Central Bank, speaking on yesterday's panel 'Has the European Banking Union kept its promises?'

The 2007-2008 global financial crisis originated in the US mortgage and wholesale banking market, but quickly spread worldwide. In Europe, this financial contagion morphed into the euro area crisis. Most press coverage of the crisis focused on the fate of Greece, and the issue of whether the country could remain in the single currency.

But another key feature of the crisis was the so-called sovereign doom loop in which potentially insolvent banks were reliant on the fiscal resources of likewise potentially insolvent states. Troubled European banks and governments faced a potential, mutually-reinforcing negative spiral.

Eurozone policymakers responded, in part, with the Banking Union, a comprehensive plan to break the link between banks and sovereigns. The key pillars of the Banking Union are the euro area's SSM, a comprehensive European-level supervisory regime, and the Single Resolution Mechanism (SRM), a plan for winding-up insolvent European banks. The Banking Union was initiated in 2012.



Bernhard Hörtnagl, ECB

"A lot of Italian banks have suffered - and suffered is the right word"

Italian concerns

The scope of Banking Union is huge. "The SSM is the largest supervisor in the world, with the significant institutions it covers holding €21.7 billion in assets," according

to Dirk Bliesener, partner at Hengeler Mueller and European liaison officer at the Banking Law Committee.

With so much at stake, and with the European economy so reliant on its banks, a key aim of the Banking Union is that it is ready to help deal with any future bank crises in Europe. In this regard, one country's banking sector in particular is currently playing on many minds. "Italy still has some problematic banks, which revived the old debate on bail-in versus bail-out," said Sascha Hoedl, partner at Schönherr Rechtsanwälte.

That, it seems, is an understatement. And lawyers in Italy are more frank. "I'm afraid to say we've had a lot of Italian banks that have suffered - and suffered is the right word," said Alessandro Portolano, co-managing partner at Chiomenti Studio Legale.

"The arguments in favour of the Banking Union are compelling, but there are also practical difficulties," said Portolano.

From his vantage point in Italy, Portolano also recognises the ECB's self-confessed issue with the crossover of the national and European approach. "We've noticed that the ECB has taken an aggressive approach to aspects of law which, at least in Italy, are more the domain of other regulators such as the exchange commis-

Looking to the US

Europeans are now looking to the US for guidance, which has long had an established bank deposit insurance framework and also made provisions, albeit overlapping ones, for bank resolution in Title I and Title II of the 2010 Dodd-Frank Act.

According to Randall Guynn, partner at Davis Polk & Wardwell, there's a distinct

contrast between US and European bank resolution models. In Europe, the bridge model can be used, sometimes referred to as the two company model, in which a new bridge bank is created. The alternative in Europe is the bail-in model, sometimes referred to as the one company model.

"Under US resolution laws, the only option is the two company model and under US bankruptcy code you can use both," said Guynn. But before the Europeans imagine that the US is entirely ahead of the game, it should be remembered that issues are also outstanding in the US. "There's progress that needs to be made, but there's impatience in Congress as to when it will be done. And some say, if it's not finished soon, we should break [the banks] up," said Guynn.

Key takeaways

- The European Central Bank has admitted there's still work to be done in the pursuit of the eurozone's Banking Union;
- In particular, the central bank cites challenges facing the Single Supervisory Mechanism (SSM) in harmonising national and European law and supervisory cultures;
- The SSM is the largest supervisor in the world, with the significant institutions it covers holding €21.7 billion in assets.

Connecting the dots from the world to the heart of South America

www.wbc.com.br

Würth • Bedoya • CostaduRels

ABOGADOS

We're business ready!

Consortium

LEGAL

TRLP LAW

LITIGATION
ARBITRATION
DISPUTE RESOLUTION
INTELLECTUAL PROPERTY
INTERNATIONAL TRADE

CORPORATE FINANCE
ENERGY
OIL AND GAS
NATURAL RESOURCES

www.trlp.com

J-K GADZAMA LLP

Legal Practitioners • Arbitrators • Mediators • Regulatory Consultants

AN INTERNATIONAL LAW FIRM IN ABUJA AND LAGOS.

FIND US AT

J-K GADZAMA COURT

PLOT 185, DAMATURU CRESCENT, GARKI II, ABUJA FCT, NIGERIA

www.gadzama.com

EDITORIAL

Editor: Tom Young
Reporters:
Amélie Labbé
Lizzie Meager
Edward Price
Brian Yap

PRODUCTION

Production editor: Joshua Pasanisi
Web production editor: Joao Fernandes

ADVERTISING

Head of sales: Richard Valmarana

Associate publisher: Americas

Roberto Miranda
Tel: +1 212 224 3494
rmiranda@euromoneyplc.com

Associate publisher: APAC & Africa

William Lo
Tel: +852 2842 6970
william.lo@iflrasia.com

Business development: Europe and Middle East

Liam Sharkey
Tel: +44 207 779 8384
lsharkey@iflr.com

Managing director: Timothy Wakefield
CEO, Legal Media Group: Matthias Paul

IBA Daily News is produced by *International Financial Law Review*, and published by Euromoney Trading Limited, London. The copyright of all editorial matter appearing in this newspaper is reserved by the publisher. No matter contained herein may be reproduced, duplicated or copied by any means without the prior consent of the holder of the copyright, requests for which should be addressed to the publisher. No legal responsibility can be accepted by Euromoney Trading Limited, IFLR or individual authors for the articles which appear in this publication. Articles that

appear in IBA Daily News are not intended as legal advice and should not be relied upon as a substitute for legal or other professional advice.

Directors: John Botts (Chairman), Andrew Rashbass (CEO), Colin Jones, The Viscount Rothermere, Sir Patrick Sergeant, Paul Zwillenberg, David Pritchard, Andrew Ballingal, Tristan Hillgarth

Opinions expressed in IBA Daily News do not necessarily represent those of the IBA or any of its members.

Printed in Washington DC by Day & Night Printing, Inc.

IFLR SUBSCRIPTIONS

UK/Asia hotline
Tel: +44 20 7779 8999
Fax: +44 20 7246 5200

US hotline
Tel: +1 212 224 3570
Fax: +1 212 224 3671

hotline@euromoney.com
Customer service: +44 20 7779 8610

Immigration's impact on law

Increased flows of migrants as seen in Europe in recent years could have a dramatic impact on legislation, according to lawyers at yesterday's morning session 'Where will my nanny or plumber come from?'

Immigration laws often focus on skilled workers, to ensure major corporates and financial institutions can hire the best staff. In fact many countries either do not have quotas or limits for skilled workers, or have them as political formalities but do not use them.

But for middle and lower skilled workers the situation can be very different. "Countries are happy to receive high levels of skilled workers, and little of the rest," said Luca Massimo Failla of Lablaw Studio Legale in Milan, who moderated the panel.

This is an especially pressing issue in Germany, which last year opened its doors to 1 million refugees fleeing conflict in Syria. "Germany has a demographic problem, we need refugees, so Angela Merkel has shown real leadership in her choice," said Thomas Griebel of Vangard in Hamburg. "Now language, location and training is key to getting these people into work, so we intend to change the law to make it easier."

Language courses are only made available to refugees whose asylum has been accepted, for example, which leaves thousands of people in Germany simply waiting for this to be approved and doing very little in the process.

Immigrants are also only permitted to seek



Thomas Griebel, Vangard

work through temporary employment agencies if they have been in the country for more than 15 months. But these agencies have proven very successful in getting low-skilled German workers into jobs, so are well suited to working with asylum seekers.

So the plan, as told by Griebel, is to change asylum law to reflect the country's changing circumstances.

Likewise the war on terror has forced Australia to transform its immigration landscape. "As immigration lawyers, we're now used to

"We are jeopardising the great social achievements we have made"

working with the police force. It's extraordinary – we're certainly earning our keep," said Maria Jockel of Holding Redlich in Melbourne. "The problem is now that we have so many immigration agents that there's a common perception of incompetence, criminality and fraud." Working with clients has become more difficult as the country's circumstances have changed, she explained.

Back to Europe, the reaction in Austria has been almost entirely different to Germany's approach. Right wing politicians and press have perpetuated a culture of fear and insecurity, according to Sabine Straka of her namesake Law Office Straka in Vienna. "The authorities have reacted by drawing borders and building fences," she said. "We are jeopardising the great social achievements we have made, largely through the use of misinformation."

The misinformation problem is felt perhaps nowhere more than in the UK, where the leaders of the Brexit campaign allegedly used repeated falsities to promote their cause. For

example the claim made that the country is 'at breaking point' on immigration, explained Melanie Lane, partner at Olswang in London.

"It's clear that British people want to see a reduction of immigration, even at the cost of full access to the single market," she said. "So there's no doubt the vote to leave will lead to a shortage of low skilled workers in the UK, at least in the short to medium term."

Generally EU countries will source their lower skilled workers from other EU countries, reducing the need for extensive legislation and points-based systems. But that's likely to change when the UK can no longer take advantage of the stream of workers from eastern European countries like Poland, Slovakia and Hungary.

So the UK will likely be forced to overhaul its third country immigration programme. Lane speculated this could mean a parallel system put in place where EU migrants require a lower level of skills than those from outside of the bloc, or more occupations added to skill shortage lists.

But of course, it can also go the other way. Naturally, legislation can have an equally drastic effect on inflows of foreign workers to any country. When the new Canadian conservative government overhauled the system in 2008 migration fell sharply year-on-year from around 116,000 in 2011 to 73,000 in 2015. That's set to be reversed with the new liberal government.



ENSafrica | Africa's largest law firm

Jack Straw: Brexit's hard truths

Former British foreign secretary Jack Straw has explained why he believes Britain voted to leave the EU, and laid some of the blame at the door of the European Commission.

In an opening speech in yesterday's session 'Brexit or bust? Better together or the end of Europe as we know it?' Straw, who campaigned for the UK to remain in the EU, argued that many Brits never felt emotionally attached to the idea of a union. "It has always been seen as a transactional relationship," he added.

Straw criticised the viability of the euro currency. "A single currency beyond a single country was inherently unstable," he said. "Breaking up the euro would be an unimaginable nightmare but there needs to be some honesty – particularly from those in the EU – about the monumental error of its creation," added Straw.

Straw explained that as the UK moved from being the so-called sick man of Europe in the 1970s to one of its most successful economies – with unemployment levels in the country now at 4.9% compared with the eurozone's 10.1% – membership became an increasing burden on the country.

He reserved particular scorn for Jean-Claude Juncker, President of the European Commission, citing his statements during the Brexit campaign as damaging. "Juncker probably lost the Remain campaign more votes than any other figure. Every time he spoke, you could see votes for the Remain campaign drain away," said Straw.



Jack Straw

"Juncker probably lost the Remain campaign more votes than any other figure"

Moving onto the fallout from Brexit, and the long process of negotiating a new relationship between Britain and the EU, Straw said that the UK's vote to leave the EU will not result in materially improved immigration controls.

The most potent argument in favour of leaving the EU was about taking back control of immigration. "But we will go on needing

migration for lower skilled jobs. And there is an understanding that we will continue to welcome highly skilled workers too," said Straw.

Formal negotiations between the UK and the EU cannot begin until Prime Minister Theresa May invokes Article 50 and starts the corresponding two-year process, which UK Brexit Secretary David Davis has insisted will

be triggered without a parliamentary vote.

Caroline Vicini, deputy head of delegation of the EU to the US explained that the so-called divorce proceedings between the two parties will be arduous, largely because of uncertainty surrounding the UK's wishes.

"No one knows what will happen," she said. "Not even the Brits know what they are aiming for. No one has heard any sort of vision as to where the UK will end up," added Vicini. "It is impossible to say how we will respond to a negotiating position that we cannot even fathom. Because we don't know what the UK wants," said Vicini.

Offering a perspective from the corporate world, Alexander Ritvay, partner at Noerr in Germany was more positive. "It's not the end of history. We have to get over it. Brexit might even have a positive impact."

Ritvay noted the rise in interest in UK companies from foreign buyers, specifically Asian companies looking to position themselves in the UK. He also said that choice of law clauses are unlikely to be drafted in English law for the time being. "I don't think it will last but it is the case for now."

The panel featured perspectives from remaining EU jurisdictions. Oana Bizgan, chief of staff in Romania at the Department of Trade and Investment explained that Central and Eastern European countries had long debated their relative position within the EU. "We worked so hard to get in and now the UK is leaving we don't understand why. We have more to lose in this divorce than we have to gain," she said.

A guide to lateral hires

Lateral hires are at an all-time high, up by over one third since the post-financial crisis recession. They are also costing more money than ever – a study conducted by ALM Legal Intelligence estimates new partner hires in the US cost firms in excess of \$1.3 billion in compensation alone every year.

The lawyer movement business may be an industry in itself but it also raises some wide-ranging ethical, contractual and regulatory questions. Who does the client belong to? What are a lawyer's duties and rights when leaving a firm? These were some of the questions asked by speakers at

yesterday morning's "Departures from and lateral hires into law firms" panel session.

"It depends if you're talking well-developed, highly-regulated legal markets or less regulated jurisdictions where law societies don't have a tremendous amount of power," said Martin Kovnats, partner at Aird & Berlis and co-vice chair of the Professional Ethics Committee. "The rules are much more like the wild west in the latter."

Who does the client belong to?

When leaving for a new firm, a lawyer may be tempted to take with him the clients he or she has spent time and money developing a relationship with. This is all well and good but it's not a straightforward matter.

According to Carlos Dominguez, partner at Hoet Pelaez Castillo & Duque, and co-chair of the Latin American Regional Forum, the lawyer has no property rights over the client, not only in his native Venezuela, but more generally in the LatAm re-

gion and globally. As such, the fees accrued during the rendering of legal services belong to the firm, and the departing lawyer has no basis on which to withhold them.

"The client has final decision over what to do but I do consider that the firm has a better right compared to the individual lawyer," he told delegates. "There may however be some factors influencing the client's decision – the lawyer's unique expertise and who brought the client in."

The sentiment was echoed by Rachel McGuckian, principal at Miles & Stockbridge, and co-vice chair of the Professional Ethics Committee. "The individual partner holds the relationship on behalf of the firm – that's the rule," she confirmed, although conceded that when asked the question of who their lawyer was, clients tended to respond with the name of an individual or a group of people.

Duties and rights

In most regulated jurisdictions, such as the UK, US or Canada, the

departing partner has strict duties towards their old firm – these can be contractual or regulatory. While ethical considerations are the same *de facto* in less supervised areas, in practice, things may be different.

In the US, whatever the conduct of lawyers and firms, they have to act in the best interests of their client who has an absolute right to choose their counsel.

This means that legal practitioners and their firms need to be clear and transparent about their movements and their duties, cooperate with the client and with each other, and not defer or wait to transfer any work, which could cost time or money. This means informing their law firm of their intention to leave before informing their client.

Harvey Cohen, partner at Dinsmore & Shohl, and senior vice chair of the Closely Held and Growing Business Enterprises Committee, said his firm carries out background and credit checks on prospective hires to ascertain if they have previously been involved in any regulatory duties or

Key takeaways

- The individual partner holds the relationship on behalf of the firm;
- The client has an absolute right to choose their counsel, and nothing can impair that;
- In most regulated jurisdictions, the departing partner has strict duties towards their old firm but the situation is less defined in countries with less oversight.

ethics violations.

However, Alberto Navarro, partner at Navarro Castex Abogados in Argentina and co-chair of the Professional Ethics Committee, said that weak bar associations and a lack of sanctions in the case of legal duty violations in South America mean that matters tend to be solved on a case-by-case basis.

"There have been cases where a partner goes and takes 20 associates with him, and it was near impossible for the old firm to do anything," he said. "You could argue that these were cases of unfair competition, but commercial law principles don't apply to the legal profession."

"The client has final decision over what to do"

Mueller: police training must improve

The training, hiring and recruitment of police officers in the US is essential to improving race relations in the country, according to the former director of the FBI Robert S Mueller III, speaking during yesterday's lunchtime discussion.

"The world witnessed the election of President Obama with great joy and the sense that racism was going to abate, that we were moving into a new world," said the IBA's executive director Mark Ellis, moderating the discussion. "But that seems to be challenged now...just on Friday there was another unarmed black man shot by a white police officer. What are we doing wrong for this to keep happening time and again?"

Mueller explained that when he was appointed director of the FBI in 2001 he learned that the average age of graduating new agents was 30 years old, and wondered why. "They said we give them a badge, a gun, and the power to affect people's lives. The most important thing they have to have is judgment and maturity."

Part of the training of FBI agents implemented by Mueller's predecessor involves going to the Holocaust museum. "We really put a lot into training our agents, and my belief is that we should be doing the same in



Robert Mueller

the police force," he added. "It's so important that these people have a greater worldview than someone just out of college."

"I felt like a high school student who hadn't done their homework"

The sheer number of law enforcement departments around the country including county, state and federal police, and all local sheriffs' offices makes this difficult. "It means unfortunately a town or city manager will look at the law enforcement budget, and the last thing they will consider is training," said Mueller. Larger entities with bigger budgets will be able to place a higher emphasis on improving it.

Mueller was sworn in as the FBI's director just one week before the 9/11 attacks. Ellis asked how he feels it has affected him as a person.

Mueller said that on September 11 2001 he was being briefed on another case when an advisor came to tell him a plane had just hit a tower in New York. Then, they came back again and said a second plane had hit a tower – at which point they

knew it was most likely a terrorist attack. Next the Federal Aviation Authority warned the Bureau of a hijacked plane heading towards Washington DC, 80 miles away. "What I remember most is trying to figure out the target – would it be the Bureau's building? Would it be the Capitol, or the White House?" That plane eventually crashed in a field in Pennsylvania.

"But what happened after was a really educating experience for me," he added, explaining that the first time he briefed President Bush after the event, he told how the Bureau was working towards identifying the hijackers by their seat numbers on the plane. "The President held up his hand and said 'stop – you're telling me you're bringing people to justice, and I expect the FBI to do that. But my question today is: what are you doing to prevent the next terrorist attack?'"

Mueller said he had not expected that question. "I felt like a high school student who hadn't done their homework," adding that the next day he of course had an answer. "And that question was the same every time I briefed Bush after 9/11, and every time I briefed President Obama – it was always the same."

CHOOSE WISELY. WE HAVE.

Meritas understands the inherent challenges of choosing the right legal counsel, especially when searching outside of your jurisdiction. That's why our law firms undergo rigorous vetting and are required to maintain quality standards for membership. Whether you need a firm next door or halfway around the world, Meritas offers exceptional service, local insights, local rates and the assurance of a wise decision.

173 full-service, independent law firms

7,000 experienced lawyers

Local representation in **226** markets worldwide

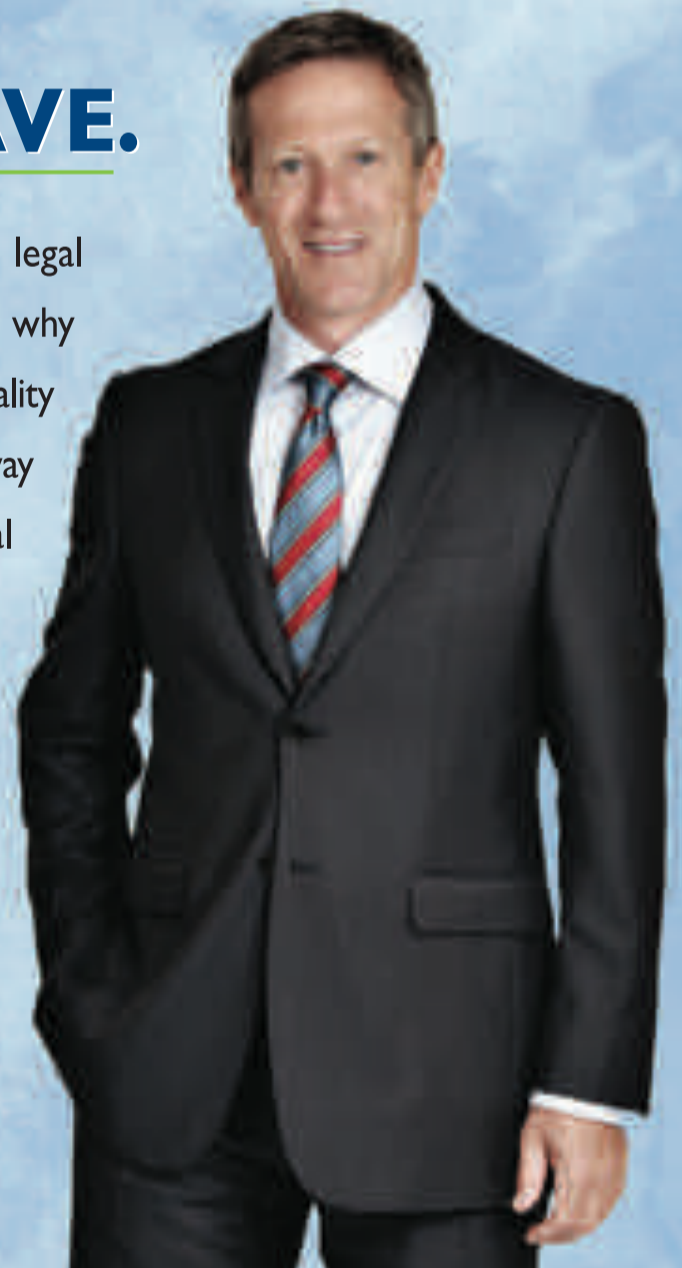


MERITAS[®]

LAW FIRMS WORLDWIDE

www.meritas.org

THE RIGHT CHOICE
FOR THE RIGHT LAWYER.



In global justice we trust

International cooperation is key to fighting harm and oppression, and combating the challenges arising from global threats, according to US attorney general Loretta Lynch.

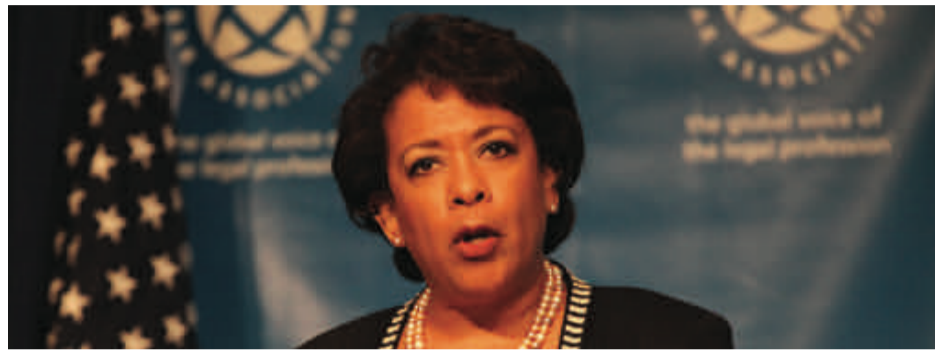
“Serving justice increasingly requires a global outlook,” she told delegates at yesterday morning’s keynote session. “As lawyers, we have a responsibility to ensure this is not limited to one nation and its borders.”

Lynch referenced recent events in the US – Saturday’s bombings in New York, and two police shootings of black men in North Carolina and Oklahoma this past week – to highlight the Department of Justice’s (DoJ) goal of finding those who commit acts of terror, and rebuilding trust between law enforcement and the communities they serve.

The IBA has a key role to play to preserve the ideal of justice as a leader in the global effort to uphold the rule of law, she continued.

“In light of recent events, we are all connected,” Lynch said. “The IBA has fought tirelessly so that all people around the world can enjoy the freedom, the dignity, the opportunity and the justice that is their birthright. This indeed requires international cooperation and coordination.”

She described the DoJ’s work in fighting terrorism, one of the most important threats the world faces at this time. It has in recent years



Loretta Lynch

partnered with global police cooperation body Interpol, European equivalent Europol, and a number of other international organisations to detect, investigate and suppress terrorist activities. It is also exchanging staff with some of these organisations, and sharing information on approximately 4,000 suspected individuals.

“We have had some successful achievements, but we need cooperation,” Lynch stressed. “It’s not only in the interest of the US to see those individuals brought to justice, but of all of us around the world.”

Another area where the DoJ is also active is cybercrime. Once again, Lynch stressed that increased cooperation between nations had been

a necessary response to the global challenges posed by digital criminals. US President Barack Obama has also been working with international partners to ensure the fight against cybercrime is a global undertaking.

Recent examples include a 2014 presidential directive outlining how the US collects intelligence in such a way to safeguard privacy – also extending protections to non-US people – and a 2016 umbrella agreement between the EU and US on the protection of data transferred for counter-terrorism purposes.

Lynch also referenced the DoJ’s third goal of combating corruption, stressing it is “any-thing but a victimless crime”. The US has re-

covered billions of dollars since setting up an asset recovery initiative in 2010.

Some of her most high-profile work in this field was the prosecution earlier this year of a number of senior executives working for international football federation Fifa and its regional subsidiaries on charges including racketeering and money laundering. US authorities, working in coordination with law enforcement in Switzerland, arrested several Fifa delegates last year over their role in a corruption scandal worth an estimated \$150 million.

IBA President David W Rivkin, who introduced the keynote address, called the role played by Lynch and US federal prosecutors more generally ‘America’s greatest contribution to the world since the Marshall plan’.

One of the most appalling crimes of all time is human trafficking, said Lynch, another field where the DoJ has benefited from global coordination, notably by sharing intelligence and resources with international partners. This global work led to the arrest last June of members of a human trafficking network operating in the Ivory Coast.

According to Lynch, the common thread uniting all those threats and the work done to address them is that the effort is ongoing.

“We have a long way to go before [all those threats are eradicated], but have made tremendous progress by working together as an international community,” she said. “As lawyers, you ensure that might does not make right – laws are not tools for repression, but the bulwarks of liberty.”

Protecting our right to the environment

A standalone human right to the environment is not needed because other rights carry it in their scope, according to panellists at yesterday’s morning session ‘Human rights and the environment.’

“There’s no doubt there’s an international acceptance of the right to life and health,” said Haynes and Boone’s Hector Herrera. “It’s not strictly necessary, but from a legal standpoint it would be convenient, for the purposes of legal proceedings in developing countries.”

Today, around 90 countries have a constitutional right to the environment – but it may be that the right to participation is a more effective means of protection. Michael Burger from the Sabin Centre for Climate Change Law agreed, adding: “To the extent that participatory rights provide a platform for achieving substantive results, absolutely – and those are often easier to come by, and recognised both in and outside of the environmental context.”

The issue is more pressing now than ever as around a third of all corporate human



Hector Herrera, Haynes and Boone

rights cases involve some kind of environmental harm. There are both public and private actors – mining, oil and gas drilling, climate finance projects, renewable energy and land grabs – all posing a threat to the rights to life, water, property, standard of living, and self-determination for people across the world.

“The fact is that environmental degradation has an adverse effect on human rights,” added Burger.

And to ensure the most effective protection of those rights in the development of projects, the local community must be involved at the earliest stage possible – that way, conflicts could be severely reduced, said Ramiro Fernandez of Avina.

He spoke of how the indigenous Mapuche community in Argentina has made strides in affecting environmental reforms in the Patagonia region of the country.

“These people got organised, and sent their children to study law, and have gained a right no one else in my country has – the right to previous consultation for underground resources projects,” he said. “They understand that they have a right to life, and that what happens to their land happens to them.”

He added that citizens in Patagonia have more commonly had to use political tools such as demonstrations and roadblocks, as opposed to legal tools: “The legal tools aren’t

there yet, but are developing.”

Speaking from the European side, Claus-Peter Martens of Sammler Usinger in Berlin explained that German Chancellor Angela Merkel’s decision to accelerate the country’s exit from nuclear power has resulted in a clash of human rights, industry and the environment.

That’s been caused by the development of renewable energy in the country – which has now increased to 30% of total energy production. “It turns out planting windmills in forests and protected areas isn’t a particularly good idea either,” he said.

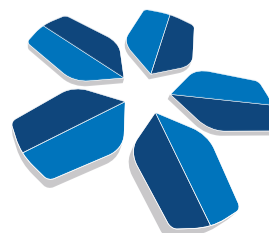
“So we went to the constitutional court and questioned whether, in light of the green power initiative, it’s still permissible to destroy villages.” In the Rhineland region of Germany alone, 130 villages have been relocated, affecting around 45,000 people.

Many road traffic reduction cases, including one recently in Düsseldorf, have been won in Germany via European law as opposed to local law. Often German courts will capitulate to the European Court of Justice on decisions, as long as European law grants basic constitutional rights at the same level. Member states have an overwhelming body of European law containing detailed rights.

But it’s generally different in every member state, according to Martens. “Between 28 member states there tends to be around 20 different approaches,” he said. “So that’s interesting in light of Brexit.”

PACHECO COTO
INTERNATIONAL LAWYERS

COSTA RICA • EL SALVADOR • GUATEMALA • HONDURAS • HONG KONG
NEW ZEALAND • NICARAGUA • SPAIN • SWITZERLAND



Consortium
L E G A L

Tough lessons on conflict

The Rt Hon. Arlene Foster MLA, First Minister of Northern Ireland, yesterday shared her thoughts on politics, global conflict and peace in Northern Ireland. She believes the Northern Ireland peace process holds lessons for solving other conflicts, is excited at how more British women are taking up powerful positions, and thinks that Brexit will be good for the UK.

Foster became First Minister on January 11 2016. A lawyer by profession, she recently campaigned in favour of Brexit, the referendum decision by the UK to leave the European Union (EU). She's also had first-hand experience of conflict – and how it's resolved.

"It's easy to look at Northern Ireland and ask what we can take from it and put it down to a Colombia or a Middle East experience," Foster said.

But according to her, every conflict is completely different. In terms of whether the international community should intervene, she believes that international help can be positive. But if they are to be of use, international negotiators must be there to mediate, not tell local people what to do. Instead, the key on the ground is how fast, and how well, those people can move outside their comfort zones.

"It's not more difficult in terms of people dying, but peace can be more difficult than actual conflict, in terms of having to step



Rt Hon. Arlene Foster, MLA

outside your comfort zone," Foster said.

Foster certainly knows about conflict. She has a deep-rooted background in Northern Irish political life, including the so-called Troubles, the period of civil strife that blighted Northern Ireland for many years. "I was born in 1970 and that was literally at the start of the euphemistically-called Troubles," she said. Her experience of that conflict quickly became personal: her father was a police officer and small farmer, and on January 4 1979, the Irish Republican Army tried to murder him. "Thankfully he survived, I think because the weapon being used

was jammed," Foster said.

The family then left the area, on the border, and moved elsewhere. But as well as what happened to her father, her school bus was also bombed – its driver was a part-time member of the security forces. There were about a dozen children on the bus; none were too badly injured.

"All of that obviously had a profound impact on me growing up," she said. A natural question is how she can, today, work with representatives of those that targeted her family. "You don't make peace with your friends, but with your enemies. That's what's

been going on in Northern Ireland," Foster said.

Women in power

Foster's a powerful example of a powerful woman. "I hope people respect me as a serious politician who wants to get things done," she said.

She's keeping a close eye on the US election, which may return the first US president in Hillary Clinton. And she's had a front seat as British politics have changed. "There have been funny moments along the way, I remember a male politician once saying to me 'bring me a cup of tea,'" she said. "I said I wasn't there to make the tea. But I have tough skin," she said.

As a leader, Foster has recently applied that tough skin during the UK's Brexit debate. She campaigned to leave while the results of the June 23 referendum saw Northern Ireland vote by a majority to remain.

"What we have to do now is to get the best possible deal for the UK in terms of exiting the European Union," she said. For Northern Ireland, a key issue therein is what will happen to the free movement of people across its border with the Republic of Ireland. Foster thinks that freedom can, and must, be preserved – even if in future the border becomes international.

"It's very important that we have the maximum of free movement," she said.



www.leglobal.org

Stars, Stripes and a Globe.

L&E GLOBAL
an alliance of employers' counsel worldwide

L&E GLOBAL is an international alliance of law firms, which provide counsel to employers on labour relations, employment law, immigration law and employee benefits through 23 international members, which have more than 1,500 attorneys across 5 continents.



QUESTION

Who will win the upcoming Presidential election – and why?



Kwame Agban
Volta River Authority
Ghana

In Ghana we have a similar political system, and with that I think Clinton has an edge. The other side will have to do more to convince people they can do better.



Stepan Guzey
Lidings
Russia

Trump. It's time for changes in the US – for eight years the Democrats have been on top, and I think his rhetoric is quite tough compared to Clinton's.



Francisco Esparraga
University of Notre Dame
Australia

Clinton. I think she has the policies, she's clearly far more intelligent than her opponent. She has the experience – far more than her opponent – and she's not a demagogue.



Serah Sanni
J B Daudu & Co
Nigeria

Clinton is a people's person. She's very diplomatic, and not too harsh. A lot of people believe in her aspirations and she knows how to relate to people and bring them together without discrimination.



Pedro de la Fuente
PwC
Argentina

I think Trump will win. America is clamouring for change and Clinton is not up to it. She's not different enough from Obama. People want the economy to improve and Trump somehow expresses that hope.



Judith Jansens van Gellicum
Benvallor
Netherlands

Clinton. I think people are afraid of the things Trump will do if he is the President. I don't know that it's for Clinton's positive attributes, but because she is better than her opponent.



Nicholas O'Donnell
Sullivan & Worcester
US

Clinton. She has a big advantage in the demographics and electoral college, and I don't think Trump will get further than he has so far. Either way it will come down to the wire.



Paola Vogrich
Vogrich Law Firm
UK

It's hard to call but it shows the country is divided. Trump is talking to emotions and anxieties and is supported by very rich people, and Clinton has a past. Trump might win.



Sameer Tegally
Conyers Dill & Pearman
Mauritius

It's difficult. If people vote rationally it will be Clinton, but if it's emotionally, and security issues sway them, then Trump may have an edge. But all in all I think Clinton.



Pamela Suttor
L Rundle & Co
Australia

I haven't met anybody who intends to vote for Trump. I don't think Clinton is a good candidate either but it'll probably be her. There are better people who've never stood for President – General Powell was impressive.



Edie Hofmeister
Tahoe Resources
US

I think Clinton will win because she's more qualified. I think she'll be able to overcome her dislikeability factor so that when it comes to being in the voting booth they will go for her.

Cybersecurity: an uphill battle

Only one-third of FTSE350 companies have a cybersecurity policy, according to a speaker during yesterday's panel: 'Cybersecurity for public companies: how to manage the risk of cyberthreats'.

Driven by a growth in cases of data manipulation or ransomware, in which a company is denied access to its internal data by third parties, several international studies have estimated losses due to cybercrimes or cybersecurity failures to range from \$400 billion to \$2 trillion globally by 2020.

According to Philip Celestini, section chief at Federal Bureau of Investigation's cyber division in Washington DC, losses due to ransomware reported to the FBI stood at roughly \$29 million last year. This number surged to \$209 million in the first quarter of this year.

But Celestini argued that these problems will not go away once one has found a solution to them, and that a vast majority of these attacks are not being reported.

"There will be counter-measures from the adversaries and will be counter-counter measures from the security environment," said Celestini.

These figures have also been seen coming out of other developed jurisdictions. Elliot Shear, managing director at W Legal in London, stressed a constant lack of due diligence from some UK firms on cyber-related matters.



Elliot Shear, W Legal, London

Due diligence

Shear referred to a recent report showing that two-thirds of FTSE350 companies being investigated have suffered from some kind of cyber breach in the last 12 months.

"In terms of due diligence, one of the key risks that tends not to be looked at as a separate entity is cyber," said Shear, adding that there is a dichotomy between the breaches and the policies.

While corporates are urged to step up their internal mechanisms against cyber attacks, investors in the US are increasingly placing the onus of ensuring protection against cybercrime on the target companies' relevant assets.

Disclosure considerations

Luke Dembosky, partner at Debevoise & Plimpton in Washington DC, argued that, from a liability standpoint, investors should conduct their own due diligence on their targeted assets up front.

But Stephanie Avakian, deputy director of the division of enforcement at the Securities and Exchange Commission in Washington DC, argued that all public companies should start thinking about their disclosure amidst an upshot in cyber-related crimes. She argued the importance of public companies reviewing their existing disclosure regularly to ensure it is up to date.

"[They need to ask themselves if] there is something in the existing disclosure... that is now misleading, and if there is a need to make a corrected disclosure," said Avakian.

"There will be counter-measures from the adversaries and will be counter-counter measures from the security environment"

Key takeaways

- Several international studies have estimated losses due to cybercrimes or cybersecurity failures to range from \$400 billion to \$2 trillion globally by 2020;
- While corporates are urged to step up their internal mechanisms against cyber attacks, investors in the US are increasingly placing the onus of ensuring maximal protection of assets on companies invested;
- Two-thirds of FTSE350 companies being investigated have suffered from some kind of cyber breach in the last 12 months.

HADEF & PARTNERS

ABU DHABI - DUBAI

A big thank you
to all our hosts.

Our IBA team from the top: Sadiq Jafar, Managing Partner Dubai, Richard Briggs, Executive Partner Dubai, Sameer Huda, Partner, Michael Lunjevich, Partner, Yasser Omar, Partner, Walid Azzam, Partner, Constanze Doering, Senior Associate, Dina Mahdi, Senior Associate

www.hadefpartners.com



DUBAI INTERNATIONAL ARBITRATION CENTRE (DIAC)



The Dubai International Arbitration Centre (DIAC) is the largest arbitration centre in the Middle East. It is a non-profit institution that provides efficient and impartial administration of commercial disputes. The DIAC Arbitration Rules, adopted in 2007, are in line with international standards. The DIAC is comprised of the Board of Trustees, the Executive Committee and the Secretariat.

The cases registered with the DIAC relate to different sectors such as real estate, engineering and construction, general commercial, media, insurance and oil and gas with large amounts in dispute, some exceeding one billion dirhams.

The DIAC has developed a pool of experienced arbitrators from different cultural and legal backgrounds located in the UAE and abroad.

The DIAC has recently established DIAC 40, a forum for young arbitration practitioners, and organizes a wide range of specialized training courses and events.

Dubai International Arbitration Centre (DIAC)
P.O. Box 1457 - Dubai, UAE
Tel: +971 4 202 8343/375
Fax: +971 4 202 8668
E-mail: arbitrationcentre@dubaichamber.com
www.diac.ae



مركز دبي للتحكيم الدولي
Dubai International Arbitration Centre
An Initiative by Dubai Chamber of Commerce & Industry